United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

SAM DATE: January 18, 2008

TO : James Small, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Central Parking System, Inc.
Case 21-CA-37718

This Section 8(a)(2) case was submitted for advice as to whether the Employer lawfully recognized the Union and entered into a bargaining agreement before hiring any predecessor employees, where the Employer earlier had announced its intention to hire all the predecessor employees who met the Employer's hiring criteria and ultimately did hire a majority of the predecessor's employees, but the Union later lost majority status after the Employer had hired the employees and started operations.

We conclude initially that the Employer was a "perfectly clear" successor at the time it recognized the Union and entered into the collective bargaining agreement, because its earlier announcement constituted a "plan to retain all" the predecessor's employees.[1] Since the Employer ultimately did hire of a majority of predecessor employees and became a full Burns successor[2] signatory to the bargaining agreement, we conclude that the Employer did not violate Section 8(a)(2) merely because the Union thereafter lost majority support during the term of that agreement.[3]

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[1] Spruce Up Corp., 209 NLRB 194, 196 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

[2] NLRB v. Burns International Security Services, 406 U.S. 272 (1972).

[3] Compare Road & Rail Services, Inc., 348 NLRB No. 77 (2006)("perfectly clear" successor did not violate 8(a)(2) by entering into bargaining agreement before hiring predecessor employees in absence of any evidence loss of Union loss of majority status).

FACTS

Ace Parking Management (Ace) had a contract to manage several parking lots for the City of Long Beach. Ace's employees were represented by the UFCW (Union) and covered by a collective-bargaining agreement.[4] In April 2006, around one year before the Ace parking lot management contract was set to expire, Long Beach City solicited bids for the next parking lot management contract. Both Ace and Central Parking System (Central) bid upon that contract.

On January 18, 2007, Long Beach City Representative Maldonado told Central that the City would recommend to the City Council that the Council award the parking lot contract to Central. The next day, Central advised the Union that Central planned to assume the Union's existing bargaining agreement with Ace if the Council awarded Central the parking lot contract.

The City Council was originally scheduled to vote on the parking lot contract on January 23. Although that vote was delayed until February 6, the Union and Central met on January 23 concerning Union recognition and the hiring of Ace's employees. The Union provided Central with a Recognition Agreement and a revised copy of its current bargaining agreement with Ace. The Recognition Agreement not only recognized the Union and assumed all terms and conditions of the Ace bargaining agreement, it provided that "All current Ace Parking employees will be offered jobs with the Employer at the time the Employer is awarded the contract with the City of Long Beach."

Central stated that it would sign both the Recognition Agreement and bargaining agreement when the City Council awarded the contract to Central. The Union asked Central to hire all of Ace's former employees. Central stated it could not guarantee the hiring all of Ace's employees, because the employees would have to meet Central's requirements, but Central would hire any Ace employee who met Central's requirements. Central had the following minimal employment requirements: employees must be over 18 years of age, possess a working social security number, have some English speaking proficiency, and not be related by family to any other employee at their particular parking lot work location.

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[4] The Ace/UFCW agreement covered cashiers, maintenance employees, valets and drivers working at seven listed parking garages and "all other facilities and/or operations operated for the City of Long Beach."

Later in the day on January 23, Representative Muldonado asked Central if it had reached an agreement with the Union, and also stated that he wanted Central to hire all of Ace's employees. Central replied that it had met with the Union and agreed to maintain the Union's bargaining agreement with Ace. Muldonado asked Central to send him a written statement confirming that it had an agreement with the Union. Accordingly, later that day Central forwarded to Muldonado an e-mail from the Union to Central in which the Union confirmed its earlier conversation with Central wherein Central had agreed to assume all the conditions in the current Ace/Union bargaining agreement. Central also e-mailed Muldonado a letter, addressed to City Council Members, stating that Central and the Union had agreed that both would honor the Union's existing bargaining agreement.

On February 6, the City Council voted to award the parking lot contract to Central.[5] On February 14, Central signed the Recognition Agreement and the bargaining agreement.[6] On February 23, the Union advised Ace's employees that Central had been awarded the Long Beach City contract, and that Central had agreed to recognize the Union and assume the terms of the existing bargaining agreement.

On February 27, Central held meetings with the Ace employees; the Union was not present. Ace had approximately 63 employees around this time. Central advised the employees that they would be hired on April 1, their seniority would not change, pay rates and benefits for bargaining unit employees would not change, and Union representation would continue. However, Central also announced some significant changes in employee terms, i.e., a more strict dress code and appearance standard, more strict rules of conduct and disciplinary policy, and a more aggressive hospitality policy requiring more personal interaction with customers.

During these meetings, two employees stated that the Union didn't do anything for them and asked Central how to get rid of the Union. Central stated it could not get involved and told the employees to contact the Board.

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[5] Three days later, Ace advised its employees that they would be laid off because Ace had lost the Long Beach contract.

[6] Several days later, the Union also signed the bargaining agreement, effective from February 24, 2007 to December 31, 2007.

Central interviewed around 55 of Ace's employees between March 5 and March 12.[7] Central offered jobs to all 55 employees who applied. All but three or four of these employees accepted. Central took over management of the City parking lots employing these employees and a five new hires on April 1, 2007.

Despite Central's assurances that it would abide by the Ace/Union bargaining agreement, Central effected two substantial changes on April 1 when the employees reported to work. First, Central required all employees to work weekends; Ace had not required senior employees to work weekends. Second, Central provided no opportunity to work overtime; a substantial amount of employee income under Ace had consisted of overtime work.

Around three weeks later on April 20, a Teamsters Local filed an election petition seeking to represent Central's Long Beach parking lot employees. In support of its petition, the Teamsters submitted 33 authorization cards, a majority of the existing 45 to 50 Central employees. The Teamsters cards were signed between March 29 and April 15.

The Region is blocking the Teamsters petition with the instant Section 8(a)(2) charge. The Teamsters argues that Central's recognition of the Union was unlawful because of Central's knowledge of employee disaffection from the Union during the February meetings, and because of Teamsters' election petition which demonstrated that the Union soon thereafter lost majority status.

ACTION

Central was a "perfectly clear" successor who owed the Union a bargaining obligation when Central entered into the bargaining agreement because Central subsequently by hired a majority of predecessor employees and became a full Burns successor. Further, Central did not violate Section 8(a)(2) when the Union lost majority support after a majority of employees were hired.

A "perfectly clear" successor arises under Spruce Up when the new employer actively or implicitly leads employees to understand, directly or through their bargaining representative, that they will be retained by

[7] Not all of Ace's 63 employees applied to Central for employment.

the successor under the same terms and conditions,[8] or fails to clearly state its intent to establish new terms and conditions before inviting predecessor employees to accept employment.[9] In deciding whether to apply the "perfectly clear" exception, the Board scrutinizes the successor's intent to hire the predecessor's employees,[10] and the clarity of the successor's intentions concerning existing terms and conditions of employment.[11] "The Spruce Up test focuses on gauging the probability that employees of the predecessor will accept employment with the successor."[12]

We initially conclude that Central was a "perfectly clear" successor under Spruce Up because the Union reasonably believed that it was highly probable that substantially all of Ace's employees would be offered and accept employment under Central's minimal employee qualifications under the same terms and conditions of employment.[13]

Initially Central made clear it would honor the existing collective-bargaining agreement. As to whether a majority of employees would be retained first, the Union could reasonably believe that Ace's employees would possess Central's minimal employee qualifications because they were

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[8] See, e.g., Elf Atochem North America, Inc., 339 NLRB 796, 796 , n.3 (2003).

[9] See, e.g., Canteen Co., 317 NLRB 1052, 1054 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997).

[10] See, e.g., Hilton's Environmental, 320 NLRB 437, 438 (1995) ("perfectly clear" intent to retain found even though employer advised employees that their hire would be conditional, depending upon their employment applications and interview).

[11] See, e.g., Windsor Convalescent Center of North Beach, 351 NLRB No. 44, sl. op. at pp 2, 66-7 ("perfectly clear" successor found, even though employer announced plan to hire employees as "temporary" employees, because employer also told employees "nothing will change.")

[12] Road & Rail Services, supra, sl. op. at 3, citing Spruce Up, supra, 209 NLRB at 195.

[13] See Hilton's Environmental, supra, (Board majority found intent to retain all even though employer advised employees that their hire would depend upon their employment applications and interview).

currently performing the same work. Second, Central advised the Union of Central's employee requirements only because the Union asked Central to hire absolutely all Ace's employees. Central raised its minimal employee qualifications solely to caution that it could not guarantee hiring all, not to caution that it wouldn't hire a majority. Third, Central's assuring the Union that Central would hire any Ace employee who met Central's requirements supported the Union's belief that Central would hire a majority if not absolutely all of Ace's employees. Finally, Central in fact offered employment to all the 55 Ace employees who applied for employment, resulting in the hire of all but three or four. Central's actual hiring of an overwhelming majority underscores the Union's and the employees' reasonable belief that Central would do so. Central therefore announced a "plan to retain all" and became a "perfectly clear" successor on January 23.

We next conclude that the Union's loss of majority support after Central had hired a majority of Ace's employees and commenced operations under the bargaining agreement did not affect Central's earlier "perfectly clear" status under Road & Rail nor give rise to an 8(a)(2) violation.

In Road & Rail, the Board found that a "perfectly clear" successor lawfully signed a bargaining agreement even though it had not yet hired any employees, because the employer acted after its "perfectly clear" announcement had already given rise to a bargaining obligation.[14] However, the Board majority in Road & Rail specifically noted that at no time in that case was there any evidence of loss of majority support for the Union.[15]

In the instant case, the Union did lose majority support evidenced by the Teamsters election petition. However, this loss occurred after Central had hired a majority of the predecessor's employees and become a Burns successor operating under the bargaining agreement. We conclude that this "post hoc" majority loss did not affect Central's prior status as a "perfectly clear" successor under Road & Rail.

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[14] Road and Rail Services, supra, slip op. at 3.

[15] Id., slip op. at 1.

The Union's majority loss did not occur until Central had become a full successor under Burns, regardless of whether it had been a "perfectly clear" successor earlier. We therefore conclude that this "post hoc" loss did not affect Central's prior "perfectly clear" status, nor give rise to a Section 8(a)(2) violation.[16]

Accordingly, the Region should dismiss this charge, absent withdrawal, because the Employer was a "perfectly clear" successor who ultimately hired a majority of its predecessor's employees, and the Union's loss of majority occurred after the Employer as a full Burns successor had lawfully recognized the Union and begun operations under the bargaining agreement.

B.J.K.

[16] While the majority disaffection and the subsequent Teamsters' majority based representation petition did not give rise to an 8(a)(2) violation, it arguably did raise a question concerning representation in the unique circumstances of this case requiring the processing of the Teamster's representation petition notwithstanding the existence of a valid collective-bargaining agreement. This question can only be decided by the Board and it not a matter for General Counsel determination. Whether the Regional Director dismisses the petition or directs an election, the Board will have an opportunity to consider this question.